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No. 565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

ARIS GLOVES, INC.,
Petitioner

v.

THE UNITED STATES

Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Customs and Patent Appeals entered in the case of The United States v. Aris Gloves, Inc., on July 7, 1961.

The opinion of the United States Customs Court, filed on June 9, 1960, R. 16, is reported in 44 Cust. Ct. 257. The opinion of the United States Court of Customs and Patent Appeals is printed as Appendix A hereto and is reported in 96 T. D. 22.

Jurisdiction

The judgment of the Court of Customs and Patent Appeals was entered on July 7, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. § 1256.

Question Presented

Whether a Notice of Intention to conduct trade-agreement negotiations with certain foreign countries "for the purpose of negotiating mutually advantageous tariff concessions" furnished the "reasonable public notice" required by statute that duty increases would be negotiated.

Statute Involved

Section 4 of the Trade Agreements Act of 1934, 48 Stat. 943, as amended, 19 U.S.C. § 1354, provides in pertinent part that:

> "Before any foreign trade agreement is concluded with any foreign government or instrumentality thereof under the provisions of this Part, reasonable public notice of the intention to negotiate an agreement with such government or instrumentality shall be given in order that any interested person may have an opportunity to present his views to the President, or to such agency as the President may designate, under such rules and regulations as the President may prescribe . . ."

Statement of the Case

The facts are undisputed. Petitioner, an importer, filed a protest with the Collector against the assessment of duty on certain imported women's leather gloves at the rate of 35 per cent. *ad valorem* under par. 1532a of the Tariff Act of 1930. The protest asserted invalidity of the increase in duty from 25% to 35% *ad valorem*, which was promulgated by Presidential Proclamation, No. 2929, June 2, 1951, T.D. 52739, after agreements reached in the Torquay Protocol of 1951 to the General Agreement on Tariffs and Trade, hereinafter termed GATT, 61 Stat. Part 5, October 30, 1947. The asserted invalidity was based on a failure to give the "reasonable public notice" to interested persons which is required by statute as a condition precedent to negotiation of a Trade Agreement, in that the notice advised that the "purpose" of the proposed

negotiations was to negotiate "concessions," a term identified with reductions or "bindings" of existing duties, and that in consequence interested persons were not given notice that an increase in duties was in contemplation.

The Customs Court (acting under 15 U.S.C. § 1583) one judge dissenting, ruled that the statement in the Notice that the proposed negotiations were

> "for the *purpose* of negotiating mutually advantageous concessions," (emphasis supplied throughout)

gave notice of reductions, not increases, of duties, and that the later reference to an "annexed list" of articles

> "to be considered for possible modification of duties and other import restrictions, imposition of additional import restrictions, or specific continuance of existing customs or excise treatment"

did not broaden the scope of the proposed negotiations but confused the stated purpose to negotiate "concessions." R. 28. Reversing, the court below agreed that the "concessions" phrase "is not itself specific as to precisely what the proposed purpose of the negotiations was to be [although "sufficiently definite," the Customs Court held, "to establish that increases . . . were not under consideration." R. 27], App. p. 5, and added that

> "Although that language alone might well fall short of reasonable notice, still, when it is read in conjunction with 'for possible modification of duties and other import restrictions' . . . the scope of the negotiations contemplated is ample to put an interested party on notice."

Reasons for Granting the Writ

The case raises a question of importance in the administration of the Trade Agreements Act, an important issue of federal law which has not been, but should be, settled by this Court. And the decision below is at war with the well established construction given to the law by the administrators charged with its enforcement.

For upwards of 25 years the term "concessions" has been, and continues to be, identified by government and public with *reductions* of duties.[1] "Interested persons" would have no warning that duty increases would be negotiated under a Notice stating that the "purpose" of the negotiations was to fashion "mutually advantageous concessions."

The absence of adequate notice is particularly serious because the Congress attached especial importance to notice under the Trade Agreements Act[2] in order to safeguard domestic interests from grave injury. Protection of "interested persons" is utterly dependent upon adequate notice of the purpose of the negotiations for there is no relief against duty increases other than this right to be heard prior to negotiations.

The importance of insuring that the term "concessions" is given its established meaning is accentuated by several

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[1] Pages 7-14 and Appendix C demonstrate this point

[2] In an earlier case, the Court below stated that

"The Trade Agreements Act of 1934 conferred vast, and many believed unreasonable, powers on the President to enter into and modify agreements with foreign governments."

It adverted to objections in the Congress that the bill

"provides no opportunity for domestic industries to be informed or heard with reference to any proposed Presidential tariff changes, even though *their very existence is at stake*."

And it further quoted the Minority reference to the

"apprehension which will constantly exist in the minds of all domestic producers over the possibility that their respective industries may, without notice or hearing, be sacrificed over night . . . the bill . . . does contain serious possibilities of disastrous consequence." *Aris Gloves* v. *United States*, 46 C.C.P.A. (Customs) 41, 45-46 (1958).

It was in response to these views, indicated the court, that the "reasonable public notice" provision emerged. That importers, who were the reciprocal mechanism for the desired expansion of American exports, could suffer equally "disastrous consequences" in the absence of notice needs no elaboration. See infra, note 21.

facts. 1) Under GATT there has been a "reduction and stabilization of more than 55,000 tariff rates."[3] No more than one, possibly two, genuine increases prior to the increase in suit could be mustered by respondent in the court below. This massive history of reductions would lead "interested persons" to identify trade negotiations with reductions only, cf. App. C, and they were entitled to unmistakeable warning that contemplated negotiations would comprehend "increases." Anything else in the circumstances was misleading to those whose sole protection was "reasonable public notice." 2) On the very eve of the decision below—after the trial court had ruled that notice of "concessions" gave no warning of "increases"—State Department published still another explanation of a forthcoming Trade Agreement negotiations in which it continued to equate "concessions" with "reductions", thus persisting in a course which is demonstrably misleading. Infra, pp. 7-8. Compare the public view of such negotiations, Appendix C. 3) The administrators' own two explanations of the Notice, published the day after it issued, Appendix D, substituted "concessions" for "modifications". Thereby the reliance of the court below upon "modifications" for adequate notice of "increases" was undercut, for the administrators themselves construed the reference in the Notice to "modifications" to mean "concessions" solely. The whole tenor of these explanations of the contemplated negotiations reveals that "reductions" and "concessions", not "increases", were alone to be considered. Infra, pp. 18-20. Interested persons were thereby lulled into a false sense of security; and fair dealing now precludes governmental repudiation of its own immediate official interpretations:

> "Men naturally trust in their government, and ought to do so, and they ought not to suffer for it." *Menges v. Dentler*, 33 Pa. 495, 500 (1859).

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[3] So respondent advised the court below, Brief, pp. 13-14.

Government action, this Court said, should exhibit even "more scrupulous regard to justice and a higher morality" than is required of individuals. *Woodruff* v. *Trapnall*, 10 How. 190, 207.

The transcendent issue is the government's cavalier disregard and concomitant destruction of rights created by Congress, official non-compliance with law:

> "Nothing can destroy a government more quickly than its failure to observe its own laws . . ." *Mapp* v. *Ohio*, 367 U.S. 643, 659.

SUMMARY OF ARGUMENT

The word "concession" is not ambiguous; it has always been used to denote reductions, not increases, of duties. This we shall prove from the face of the basic multilateral Agreement, GATT, from the face of the Executive Order which promulgated the relevant regulations, from the Tariff Act and various administrative interpretations.

The subsequent reference in the Notice to an "annexed" list" of articles to be considered for "possible modification of duties" was a general description which the reader would understand to refer to the special statement of the *purpose* to negotiate "concessions," a particular kind of modification. The term "modification" itself derives from a statute designed to reduce duties and other trade barriers. Administrative statements published the day after the Notice issued, explaining the contemplated negotiations, mention only duty reductions and virtually identify "modifications" with "concessions," thereby undermining the opinion below. "Interested persons" were entitled to rely upon respondent's own immediate gloss upon its Notice, and respondent should not now be permitted to repudiate it to their injury.

ARGUMENT

I. "Concessions" Mean Reductions of Duties

1) *GATT*

The General Agreement on Tariffs and Trade—GATT (61 Stat. Part 5, Oct. 30, 1947)—a State Department spokesman recently stated,

> "is the most comprehensive agreement ever concluded, for the *reduction* of trade barriers . . .
>
> • • • •
>
> "As in previous general tariff conferences the forthcoming negotiations at Geneva [1960-61] will have as their aim the *reduction* of the general level of tariffs and other charges on imports *through* the exchange of reciprocal and *mutually advantageous concessions.*"

Such

> "tariff *concessions* include *reductions* in import duties or commitments to 'bind' (i.e. *not to increase*) specified duties or duty-free treatment, and, in some cases, the complete elimination of duties or the reduction or elimination of tariff preferences."[4]

In a word, states the same spokesman, by

> "such [trade] agreements the United States *reduces* or agrees *not to increase* tariff rates applying to specified imports from abroad in exchange for similar *concessions* by other countries on products exported by the United States.[5]

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[4] Catudal, *The 1960-61 GATT Tariff Conference*, Dept. State Publ. 6958, Commercial Policy Series 172, p. 2 (March 1960). Mr. Catudal is an adviser in the Trade Agreements Division, Department of State. Id. at p. 1.

As Mr. Catudal states,

> "The Geneva negotiations will give us a chance to bargain for tariff *reductions* abroad and thus strengthen the position of our export trade in an increasingly competitive world market." Id. at p. 1.

[5] Catudal, *How a Trade Agreement is Made*, Dept. State Publ. 6615, Commercial Policy Series 165, February, 1958, p. 1.

The bracketing of agreements to "reduce" and "not to increase" duties plainly excludes "increases" from "concessions."[6]

History sheds further light: The same State Department spokesman tells us that the bilateral Trade Agreements negotiated "from 1934 to World War II"

> "helped to slow down the worldwide trend toward ever higher barriers to trade . . .
>
> . . . it was evident that much remained to be done in the *reduction* of trade barriers . . .
>
> . . . it was clear that bilateral agreements could not achieve the needed *reductions*. Countries tended to hold back tariff *concessions* . . ."[7]

Such was the genesis of GATT. Among its objectives was to expand "the production and exchange of goods," and the "preamble" of GATT states that the contracting parties

> "desiring to contribute to these objectives by entering into reciprocal and mutually advantageous arrangements *directed* to the substantial *reduction* of tariffs and other trade barriers . . . have agreed to

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[6] In its Preliminary Analysis of GATT, the State Department stated that

> "France granted *concessions* on electric motors [etc.]. The duty on household refrigeration was *reduced* from 18% plus quota to 15%." Dept. State Publ. 2983, Commercial Series 109, p. 14, Nov. 1947.

And it stated, for example,

> "Concessions were made by Australia on 126 tariff items . . . On 87 of these items duties were reduced, on 26 items duties were reduced but not bound, on 10 items the existing rates were bound against increase, on 2 items preference margins only were bound and 1 item was bound on the duty free list." Id. at 23.

[7] Caudal, *The General Agreement on Tariffs and Trade: An Article-By-Article Analysis in Layman's Language*, Dept. State Publ. 7325, Commercial Policy Series 179, p. 2, July, 1961. An earlier and "official" analysis is cited supra, note 6.

> the tariff *concessions* and general provisions of the GATT."[8]

And the same spokesman states that under Article XXVIII bis, "tariff negotiations"

> "may be directed to the reduction of duties or the binding of duties *against increase* above specified levels. In principle, the binding against increase . . . is recognized as a *concession equivalent* in value to the *reduction* of high duties."[9]

The signatories, therefore, were well aware of "increases" but did not comprehend them in "concessions." Instead, Article XXIV provided

> "for the granting of compensatory tariff *concessions to offset increases* . . ."[10]

thereby differentiating "concessions" from "increases."

Under GATT "concessions" and "reductions" were well-nigh synonymous:

> "the Committee may consider whether it would be possible or desirable to make a *concession* on only part of a tariff category *or limit* the effect of a duty *reduction* through the use of a tariff quota . . ."[11]

2) *Executive Order No. 10082*

Executive Order No. 10082, promulgated October 5, 1949, sets forth the "Administrative Procedures for Reciprocal Trade-Agreements Program."[12]

Paragraph 6 of the Executive Order speaks of "granting a concession" and paragraph 7 of "obtaining a concession." Manifestly, the United States would not seek

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[8] Id. at 4.

[9] Id. at p. 17.

[10] Catudal, supra, note 4 at p. 3.

[11] Id. at p. 7, see also note 6 supra.

[12] Reported 19 U.S.C.A. § 1351, Supp.

to "obtain" an increase from the negotiating country of that country's duty, for that would impede the expansion of American exports. See p. 15, infra. It could "obtain a concession" only in the shape of reduction or "binding" and the grant of a concession in the United States similarly connotes a reduction.

Paragraph 10 requires the inclusion of an "escape clause" with respect to "each concession granted", providing that if as a result of

> "such concession . . . any article is being imported in such relatively increased quantities . . . as to cause or threaten serious injury to the domestic industry producing like or directly competitive articles, the United States shall be free to withdraw or modify the concession . . ."

Again "concession" can mean only a reduction of duty. For an increase by the United States of a given duty from say 50% to 100% could not injure the domestic industry because it would tend to reduce competing importations. But a reduction of duty from 100% to 50% might well result in such increased imports as to injure domestic industry. Concession as used in the Executive Order must therefore mean "reduction." So too, where another country discriminates against American industry, Paragraph 12 of the Executive Order authorizes the

> "*withholding* from such country of the *benefit* of concessions granted under the Trade Agreement Act. . . ."

An antecedent *increase* of the United States duty would scarcely have constituted a "benefit" to the discriminating country: but withdrawal of a "reduction" in duty would withhold the "benefit of a concession."[13]

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[13] The other side of the coin is presented by Paragraph 11 which directs that every trade agreement contain a

> "most-favored-nation commitment securing for the United States the *benefits* of all tariff *concessions* . . . accorded by

Thus the Executive Order equated "concessions" with "reductions."

3) *The Statute*

The statute also identifies "concession" with a "reduction" of duties. Section 1363, 19 U.S.C., takes up the "escape clause" earlier noticed in the Executive Order, and for which provision had been made in Article XIX of GATT.[14] It provides that

> a) "*No reduction* in any rate of duty, or binding of any existing customs or excise treatment, or *other concession* hereafter proclaimed under § 1351 of this title, shall be permitted to continue in effect when the product upon which the *concession* has been granted is, as a result . . . of the duty . . . *reflecting such concession*, being imported into the United States in such increased quantities . . . as to cause or threaten serious injury to the domestic industry . . ." 65 Stat. 74

See § 1362 for parallel provision. Under the *noscitur sociis* rule, the phrase "other concession" can only mean concessions similar to duty reductions or bindings.[15] *Vir-*

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the other party . . . to any third country."

Once more this benefit can only mean a duty reduction granted by a third country to another country, for an "increase" would in these circumstances confer no benefit on us whatever.

[14] Catudal, supra, note 7 at p. 12.

[15] The Appendix to the House Report, under the heading "Safeguards 'Built Into' Individual Concessions" four times identifies "concessions" with "reductions," once with "binding," and not once with an "increase" of duties:

"1) On certain items the concession may be only the 'binding' of the existing duty rate or existing duty-free status . . .

2) On certain other items, the recommendation may be to reduce the duty only 10% or 20% instead of the full 50% which would be possible under the Presidential authority.

3) The duty may be reduced on only a specific quantity of im-

ginia v. *Tennessee*, 148 U. S. 503, 519. And the logic of the Escape Clause, as we have seen, compels the same conclusion. To be sure, § 1363 came about one year after the publication of the notice in suit, having been added by the "Trade Agreements Extension Act of 1951, 65 Stat. 74. But it merely picked up the terminology of the earlier Executive Order and the administrative interpretations.[16] As a subsequent clarification or interpretation of the regulations and proclamations issued under § 1351,

> "it would go far to remove any doubt as to [their] meaning." *First National Bank* v. *Missouri*, 263 U. S. 640, 658.[17]

4) *Contemporaneous Administrative Interpretations*

The State Department, a member of both the Interdepartmental Committee on Trade Agreements and of the Committee on Reciprocity Information set up to assist in administering the negotiation proceedings by paragraphs 1 and 2 of Executive Order 10082, stated in its Preliminary Analysis of GATT that:

> "The Agreement consists of 1) Schedules of tariff concessions, and 2) General Provisions dealing . . .

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ports of the product in question.

4) The duty may be reduced on only specified types, grades or value classes of the product in question . . .

5) In some cases, such as that of fresh vegetables a reduced duty may apply only during a specified season." H. Rept. No. 14, p. 12, 82d Cong., 1st Sess. Jan. 29, 1951.

[16] "United States concessions may consist of (a) a reduction in the United States Tariff rate, (b) binding of that rate, that is an agreement not to increase the rate, or (c) a binding of duty-free status, that is an agreement not to impose a duty on an article which is admitted free of duty when the agreement is concluded." H. Rept. No. 14 at p. 6; cf. the Preliminary Analysis of GATT, *infra*, pp. 12-13.

[17] And see *United States* v. *Freeman*, 3 How. 556, 565; *United States* v. *Aluminum Co. of America*, 148 F. (2d) 416, 429 (2d Cir.)

> with barriers to trade other than tariffs. Each country applying the Agreement undertakes to *grant* to the other parties to the Agreement the *reductions* or bindings of tariff treatment specified in the Schedules of tariff *concessions* . . . The concessions include the complete elimination of certain duties, *reductions* of duty, the binding [see note 13, supra] of duties at existing levels, and the binding of duty-free treatment." Dept. State Publication, 2983. Commercial Policy Series 109, November 1947, p. 1.

And it concluded with a

> "Summary—The *concessions* made by the United States at Geneva consisted of bindings of tariff rates or duty-free entry and *reductions* in tariff rates." (p. 133)

Similar analyses by the State Department were published with respect to the 1949 *Annecy Protocol* to GATT, and the *Torquay Protocol* of May, 1951 to GATT, which increased the duty in suit from 25% to 35%. Relevant excerpts therefrom are printed in Appendix B hereto. The Torquay analysis, for example, states that the United States made

> "duty reductions on a considerable number of items on which no trade agreement concessions have previously been made." [18]

This interchangeable use of "concession" and "reduction" equates the two terms, and as was said of the State Department's "comprehensive treatment of the concessions granted" in a Trade Agreement with the United Kingdom, it is "presumably authoritative." [19] *Morganite, Inc.* v.

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[18] Dept. State Publ. 4209, Commercial Policy Series 135, p. 289, May 1951.

[19] The "author of a document is ordinarily the authoritative interpreter of its purposes." *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U. S. 219, 227.

The State Department also stated of the Torquay Protocol, 1951, that

> "The concessions obtained by the United States consisted

United States, 42 C.C.P.A. (Customs) 207, 213 (1954). Such contemporaneous administrative interpretations are entitled to "great weight." *United States* v. *American Trucking Assn.*, 310 U. S. 534, 549.

In sum, the word "concessions" had been given an invariant meaning by GATT, by the Executive Order, by the Statute and by the administrators themselves, a meaning confined to the reduction or "binding" of existing duties. The court below, therefore, erred in determining that "concession" was equivocal, certainly as regards whether it included "increases" of duty, for that "increases" were excluded seems crystal-clear, under the rule that the expression of one thing excludes other things. *Continental Casualty Co.* v. *United States*, 314 U. S. 527, 533.

In the court below, respondent argued that the Notice

> "alerted the public to the possibility . . . of increases achieved by the *possible withdrawal* of previously granted duty reductions."

stating that a certain paragraph of the Notice

> "In clear terms . . . expressed the possibility that previously negotiated concessions on individual products 'may be modified or withdrawn on or after January 1, 1951 . . .'" Br. 26, 24.

The only reference contained in the Notice to the withdrawal of concessions stated that there would be a proposal to change the date

> "in Article XXVIII . . . to a later date . . . [so] that the contracting parties would be *precluded* . . . until

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largely of duty reductions and the binding of favorable duties or duty-free treatment . . ." Supra note 18 at p. 8.

There are 460 pages listing reductions and bindings of thousands of existing duties; a State Department Press Release, No. 463, May 31, 1951, said Torquay effected *increases on 3 products*. Is it to be wondered that the State Department could not avoid consistently equating concessions with reductions?

such later date from invoking Article XXVIII to modify or *withdraw* concessions." App. 10-11-15. 11.

A proposed change of date to preclude withdrawal of concessions would suggest that no immediate withdrawals were contemplated.

II. The General Reference to "Modification of Duties" Did Not Enlarge the Stated "Purpose" to Deal With "Concessions".

The "ambiguity" of "concessions" was cured, the court below held, by the subsequent "modifications" phrase. Supra, p. 3.[20] But that phrase itself is redolent of "reductions", not "increases". It is a paraphrase of § 1351(a)(2), the purpose of which was to expand American exports by bargaining for lower foreign duties in return for reduction of American duties on imports.[21] Were the mean-

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[20] After stating that the proposed negotiations were

> "for the purpose of negotiating mutually advantageous concessions,"

the Notice went on to mention an "annexed list" of articles

> "to be considered for possible modification of duties and *other* import restrictions, imposition of additional import restrictions, or specific continuance of existing customs or excise treatment." App. 9-10

Catudal cites "quotas" as an example of "restrictions, supra note 3 at p. 2.

[21] "For the purpose of expanding foreign markets for the products of the United States . . . by regulating the admission of foreign goods into the United States . . . so that foreign markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States, the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by the means hereinafter speci-

ing of § 1351(a) less plain, it would be placed beyond peradventure by the legislative history of the Act of 1934, which added the section. Assistant Secretary of State Sayre explained that the executives of most foreign countries have authority

> "for negotiating duties below those in the general or maximum tariff schedules,"

that it was a common practice

> "to start with a general tariff and authorize the executive branch of the government to grant reductions of duties in the course of negotiation . . ."

and that

> "the decisions as to which duties are to be reduced and how much are made by the executive branch."[22]

True, § 1351 confers a power of "increasing or decreasing" duties. But increases were "retaliations" not concessions.[23] One who reads § 1351 and its legislative history

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fied, is authorized from time to time—

* * * *

(2) To proclaim such modifications of existing duties and other import restrictions . . ." 48 Stat. 943, 19 U.S.C. § 1351(a)(2)

See also note 24, infra.

[22] H. Rept. No. 1000, p. 6, 73d Cong. 2d Sess.

The Minority report stated that the President proposes that "he be allowed discretionary authority . . . to find foreign markets for our surplus products by entering into reciprocal trade agreements . . . under which he would permit the importation of certain foreign articles *at reduced* rates of duty in return for *similar concessions* in favor of certain of our products in foreign markets." Id. at p. 29. See note 20, infra.

[23] The House Minority Report stated that

> "in each previous reciprocity measure Congress has either fixed in advance the concessions or retaliations the President might use as a basis for negotiation." H. Rept. No. 1000, p. 21, 73rd Cong., 2nd Sess.

That the Minority associated "concessions" with "reductions" is shown by its statement quoted in note 22, supra.

must conclude that the thrust of the section was towards reciprocal tariff concessions or reductions.[24] Bilateral agreements negotiated thereunder effected some "reductions" of tariff barriers. Supra, p. 8. Subsequently,

> "As a result of four tariff bargaining conferences which have been held between 1947 and 1956 customs duties on tens of thousands of products, traded across the frontiers, have been reduced." *What GATT is and What GATT has Done*, GATT Secretariat, Geneva, 10th ed. Jan. 1961, p. 1.

When the history of "55,000" reductions and specifications and stabilizations is contrasted with at most one or two increases under the statute, supra, p. 5, the statutory term "modifications" inevitably connotes "reductions" to the public. Compare Appendix C. Against that history, what "interested person", reading that the negotiations were

> "For the purpose of negotiating mutually advantageous tariff concessions",

would conclude from the reference to "possible modifications of duties" respecting the "annexed list" of articles that there would be any "modification" other than the concession-reduction which was the stated purpose of the negotiation. If "modification" meant more, the narrow statement of "purpose" in terms of "concessions" was

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[24] Respondent told the court below that

> "the chief thrust of American policy has been directed to obtaining lower rates for exports from the United States . . ." Brief, 25.

Mr. Catudal, a legal adviser of the State Department says:

> "The Trade Agreements Act of 1934, as extended and amended, gives the President limited authority to enter into trade agreements with foreign countries whereby the United States agrees to reduce, or to bind against increases, tariff rates applying to specified imported products in return for concessions for products exported by the United States." Supra, note 4 at 5.

misleading. Certainly such a notice lacks the clarity and definiteness which is required of an adequate notice.[25]

Any doubt as to the meaning of the Notice read as an entirety was set at rest by the administrators themselves. On the day following publication of its Notice, the Interdepartmental Committee issued a statement with reference to its freshly issued

> "formal notice of the intention of the United States to undertake negotiations . . . for reciprocal tariff and other trade-barrier *concessions*";

it referred to negotiations

> "for mutually advantageous tariff and other concessions",

and it described the "list" tied to "modification of duties", on which the decision below turned, as

> "a list of products imported into the United States on which *tariff concessions may be considered* . . ." App. 13, 15.

Thus the government itself construed the reference to "modification of duties" in the very Notice in suit as meaning "tariff concessions", no more. As if to remove any doubt, the Interdepartmental Committee went on to say that

> "The hearings will enable interested persons to present views and information regarding concessions on United States export products which might be requested from other countries, concessions on imports into this country which the United States might offer in return . .",

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[25] The court below said of a comparable Tariff Commission hearing notice that it is "required to be sufficiently definite"

> "as to fairly, adequately, and reasonably acquaint interested parties with the purpose and scope of its investigations; otherwise the statute would be circumvented, and, as a consequence, importers, American industries, and the general public might be deprived of their statutory rights." *Carl Zeiss, Inc. v. United States*, 23 C.C.P.A. (Customs) 7, 14.

clearly referring to mutual reductions. App. 15. And it closed by stating that

> "The tariff *concessions* on specific products which may be negotiated under the General Agreement are of *various types*. They may be *reductions* in specified rates of customs duty, or '*bindings*' of such rates—a guarantee *not to increase* them during the life of the Agreement. Likewise, a concession may consist of the binding of the duty-free status of an article—a guarantee not to impose a tariff on the article if it is being admitted duty free at the time the agreement is concluded." App. 18.

To be sure, the Committee called attention to the statutory limitation of 50% upon the *power* to "increase or decrease" duties, but this merely suggests that the "concessions" would be governed by the 50% limitation. The Committees' explanation of the Notice made no mention of an *intention* to discuss "modification of duties", let alone increases.

On the same day the Committee for Reciprocity Information referred to the Notice of intention to conduct trade-agreement negotiations published the day before, and said with reference to the "list" of articles "to be considered for possible modification of duties . . ."

> "Annexed to this public notice is a list of articles imported into the United States to be considered for possible *concessions* in the negotiations." Appendix App. 19.

Once more the government thereby construed the "modification of duties" clause, on which the decision of the court below turned, to mean "possible concessions", which as we have shown, meant reductions, not increases of duty.[26]

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[26] As did the Interdepartmental Committee, the Reciprocity Committee invited persons "interested in import products" to present

How can respondent now repudiate its own construction of the Notice; how can it urge that a layman should have read the Notice in a quite different sense than the government itself hastened to assign to it? In an analogous situation, after an Ohio conviction of those who relied upon representations of state officials, this Court refused to sanction a

> "most indefensible entrapment by the State—convicting a citizen for exercising a privilege which the State clearly had told him was available to him." *Raley* v. *Ohio*, 360 U.S. 423, 438.

Here petitioner did not exercise a privilege which was its only protection solely because responsible officers had assured it that there was no need to do so. To permit this action to stand is to encourage "active misleading." Ibid.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted

RAOUL BERGER
Counsel for Petitioner

MARY REHAN
Of Counsel

November , 1961

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to it their "views concerning possible tariff concessions by the United States on any product" but warned again that "no tariff reduction will be considered on any product which is not included in the list annexed . ." And it invited "persons interested in export items" to present their view respecting "concessions that might be requested of the foreign governments . ." Appendix App. 21

APPENDIX A

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

(No. 5053)

UNITED STATES

v.

ARIS GLOVES, INC.

Appeal From United States Customs Court, C.D. 2185

Before WORLEY, Chief Judge, and RICH, MARTIN, and SMITH, Associate Judges, and Judge WILLIAM H. KIRKPATRICK.[1]

WORLEY, Chief Judge, delivered the opinion of the court:

[1] This appeal from the judgment of the United States Customs Court, First Division, C.D. 2185, one judge dissenting, involves certain women's leather gloves which were assessed by the collector at 35 per centum ad valorem under paragraph 1532(a) of the Tariff Act of 1930, as modified by the Torquay Protocol to the General Agreement on Tariffs and Trade, T.D. 52739. The importer contended, and a majority of the Customs Court held, that duty should have been assessed at 25 per centum ad valorem under the provisions of the same paragraph as modified by the General Agreement on Tariffs and Trade, T.D. 51802, on the ground that the provision of the Torquay Protocol increasing the duty to 35 per centum ad valorem was void for want of proper notice of inten-

[1] United States Senior District Judge for the Eastern District of Pennsylvania, designated to participate *in place of Judge O'Connell*, pursuant to provisions of Section 294(d), Title 28, United States Code.

tion to negotiate as provided by Section 4 of the Trade Agreements Act of 1934, as amended, and paragraphs 4 and 5 of Executive Order No. 10082. The pertinent portions of the section and paragraphs are:

> Sec. 4. Before any foreign trade agreement is concluded with any foreign government or instrumentality thereof under the provisions of this Act, *reasonable public notice of the intention to negotiate an agreement with such government or instrumentality shall be given in order that any interested person may have an opportunity to present his views to the President, or to such agency as the President may designate, under such rules and regulations as the President may prescribe;* * * *. (Italics supplied.)
>
> Par. 4. Before entering into the negotiation of a proposed trade agreement under the Trade Agreements Act, as amended, the Trade Agreements Committee shall submit to the President for his approval a list of all articles imported into the United States which it is proposed should be considered in such negotiations *for possible modification of duties and other import restrictions, imposition of additional import restrictions,* or specific *continuance of existing customs or excise treatment.* Upon approval by the President of any such list, as originally submitted or in amended form, the Trade Agreements Committee shall cause notice of intention to negotiate such agreement, together with such list of articles, to be published in the FEDERAL REGISTER. Such notice and list shall also be issued to the press, and sufficient copies shall be furnished to the Committee for Reciprocity Information for use in connection with such hearings as the Committee may hold with respect thereto. Such notice, together with the list or a statement as to its availability, shall also be published in the Department of State Bulletin, Treasury Decisions, and the Foreign Commerce Weekly. (Italics supplied.)
>
> Par. 5. Any interested person desiring to present his views with respect to any article in any list referred to in paragraph 4 hereof, or with respect to

any other aspect of a proposed trade agreement, may present such views to the Committee for Reciprocity Information, which shall accord reasonable opportunity for the presentation of such views.

The pertinent portions of the notice of intention to negotiate are:

> Pursuant to Section 4 of the Trade Agreements Act, approved June 12, 1934, as amended (48 Stat. 945, ch. 474, Public Law 307, 81st Cong.) and to paragraph 4 of Executive Order 10082 of October 5, 1949 (14 F.R. 6105), notice is hereby given by the Interdepartmental Committee on Trade Agreements of intention to conduct trade-agreement negotiations with the following countries • • •. It is proposed to enter into negotiations with these countries for the purpose of negotiating *mutually advantageous tariff concessions.*
> • • •
>
> There is annexed hereto a list of articles imported into the United States *to be considered for possible modification of duties and other import restrictions, imposition of additional import restrictions, or specific continuance of existing customs or excise treatment* in proposed trade agreement negotiation with the above countries. (Italics supplied.)
>
> • • • •
>
> *No article will be considered* in the negotiations for possible modification of duties or other import restrictions, imposition of additional import restrictions, or specific continuance of existing customs or excise treatment *unless it is included, specifically or by reference, in the annexed list* or unless it is subsequently included in a supplementary public list. No duty or import tax imposed under a paragraph or section of the Tariff Act or Internal Revenue Code other than the paragraph or section listed with respect to such article will be considered for a possible decrease, although an additional or separate duty on an article included in the annexed list which is imposed under a paragraph or section other than that listed may be bound against increase as an assurance

> that the concession under the listed paragraph or section will not be nullified. (Italics supplied.)
>
> • • • •
>
> Pursuant to Section 4 of the Trade Agreements Act, as amended, and paragraph 5 of Executive Order 10082 of October 5, 1949, information and views as to any aspect of the proposals announced in this notice may be submitted to the Committee for Reciprocity Information in accordance with the announcement of this date issued by that committee.

It is not contended that the formal mechanical requirements of publication of the notice were not complied with, or that it did not properly describe the merchandise at bar. The sole issue is whether the wording of the notice was such as to give reasonable notice that the rate of duty on such merchandise might be increased.

[2] The majority of the Customs Court was of the opinion that the statement in the notice that the proposed negotiations were "for the purpose of negotiating mutually advantageous tariff concessions" was "sufficiently definite to establish that increases in rates of United States import duties were not under consideration," and that subsequent reference in the notice to "possible modification of duties and other import restrictions, imposition of additional import restrictions or specific continuance of existing customs or excise treatment;" at most merely "introduced an element of confusion and uncertainty into the notice, since it is obviously in conflict with the purpose stated in the preceding paragraph for which it was proposed to enter into trade agreement negotiations, i.e., to negotiate mutually advantageous tariff concessions."

The dissenting judge was, as reflected by the following excerpt, of a contrary opinion, stating

> In my opinion, the foregoing notice, if read as a whole, which it must be, clearly advised all interested parties that in the negotiation of the proposed agreement both tariff reductions and tariff advances would

be considered. To reach any other conclusion requires that the second paragraph of the notice stating "There is annexed hereto a list of articles imported into the United States to be considered for possible modification of duties and other import restrictions, imposition of additional import restrictions, or specific continuance of existing customs or excise treatment" must be completely ignored. Clearly, in determining the meaning and effect of a notice, its whole contents must be considered. One of the primary rules of statutory construction is that the entire contents of a statute must be considered and effect given to all the language contained therein, if possible. *Nestle's Food Co. (Inc.)* v. *United States*, 16 Ct. Cust. Appls. 451, T.D. 43199; *Cassard Romano Co., David A. Haagens* v. *United States*, 19 C.C.P.A. (Customs) 191, T.D. 45294. The notices such as those here under consideration should be likewise so construed.

We are unable to agree with the majority view that the phrase "mutually advantageous tariff concessions" is so definite as to necessarily preclude consideration of rate increases any more than it would preclude consideration of lower rates. We do agree, however, with the majority that the phrase "is not itself specific as to precisely what the proposed purpose of the negotiations was to be, * * *." Although that language alone might well fall short of reasonable notice, still, when it is read in conjunction with "for possible modification of duties and other import restrictions, imposition of additional import restrictions, or specific continuance of existing customs or excise treatment," the scope of the negotiations contemplated is ample to put an interested party on notice.

In our opinion the instant language, when read as a whole, is sufficient to constitute "reasonable public notice" to interested parties as contemplated by the Trade Agreements Act. Under such circumstances we are obliged to *reverse* the judgment appealed from.

APPENDIX B

Preliminary Analysis of Annecy Protocol to GATT, 1949
State Dept. Publ. 3651, Commercial Policy Series 120

> "Like the schedules of concessions annexed to the General Agreement of 1947, the schedules annexed to the Protocol of Accession include commitments with regard to reduction or elimination of customs duties on specified articles, binding of existing customs treatment (including duty-free status) of specified articles, and reduction or elimination of tariff preferences on specified articles." Id. at p. 2

> "The United States concessions include reductions and bindings of existing duty rates or duty-free status." Id. at 138.

Preliminary Analysis of Torquay Protocol, 1951
State Dept. Publ. 4209, Commercial Policy Series 135

> "The concessions obtained by the United States consisted largely of duty reductions and the binding of favorable duties or duty-free treatment . . ." Id. at p. 8.

> "In return for the concessions obtained . . . the United States granted concessions. The concessions granted by the United States at Torquay were of three types . . . Reductions in rates of duty; bindings of existing rates and bindings of duty-free status." Id. at p. 288

The United States made

> "duty reductions on a considerable number of items on which no trade agreement concessions have previously been made . . ." Id. at p. 289.

APPENDIX C

THE PUBLIC UNDERSTANDING

On October 26, 1961, the Washington Post, printed an article by Bernard D. Nossiter, wherein he stated that the Trade Agreements Act

> "with its successive renewals, has enabled the President to trade reductions in American tariffs for cuts in the tariff walls of other nations." Page A8

In the same issue, Walter Lippman, referring to GATT, stated that

> "we must devise new procedures for negotiating reductions of tariffs exacted on our exports."

On November 7, 1961, the Washington Post contained an article by Bernard D. Nossiter, p. 1, wherein was stated that

> "President Kennedy reportedly favors making his major drive for new tariff-cutting authority when Congress returns in January.
>
> • • • •
>
> There is broad agreement within the Administration that the President needs broader tariff-negotiating authority than the Trade Agreements Act now provides . . .
>
> • • • •
>
> Here are some of the elements Administration officials are considering for the broader trade measures:
>
> Give the President power to cut tariffs by 50 per cent in exchange for comparable reductions by other nations. Authority of this size was in the original 1934 Act and was given again to the President in 1945. However, additional cuts were limited to 15 per cent in 1955 and 20 per cent in 1958.
>
> • • • •"

Article by Sylvia Porter, Washington Evening Star, November 16, 1961, p. A21:

"*Question*—What about our own tariff walls?

Answer—Since the passage of the Reciprocal Trade Agreements Act of 1934, we have reduced our tariffs to almost one-fifth of what they were. Eleven times Congress has renewed the act—under which the President has limited authority to reach trade agreements with other countries and cut tariffs on specific products provided the countries in turn make similar concessions to us. • • •"

APPENDIX D

INTERDEPARTMENTAL COMMITTEE ON TRADE AGREEMENTS

Trade Agreement Negotiations With Each of the Following Countries:

I. Australia, Belgium, Brazil, Canada, France, Luxemburg, New Zealand, the Netherlands, Norway, the Union of South Africa, and the United Kingdom, which are contracting parties to the General Agreement on Tariffs and Trade; and

II. Austria, the Federal Republic of Germany, Guatemala, Korea, Peru, and Turkey, which are applicants for accession to the General Agreement on Tariffs and Trade; and

III. Possible Adjustment in Preferential Rates on Cuban Products.

Pursuant to Section 4 of the Trade Agreements Act, approved June 12, 1934, as amended (48 Stat. 945, ch. 474, Public Law 307, 81st Cong.) and to paragraph 4 of Executive Order 10082 of October 5, 1949 (14 F.R. 6105), notice is hereby given by the Interdepartmental Committee on Trade Agreements of intention to conduct trade agreement negotiations with the following countries, including in each case areas in respect of which the country has authority to conduct trade agreement negotiations: Australia, Austria, Belgium, Brazil, Canada, France, the Federal Republic of Germany, Guatemala, Korea, Luxemburg, New Zealand, the Netherlands, Norway, Peru, Turkey, the Union of South Africa, and the United Kingdom. It is proposed to enter into negotiations with these countries for the purpose of negotiating mutually advantageous tariff concessions. Negotiations with Austria, the Federal Republic of Germany, Guatemala, Korea, Peru, and Turkey will also be for the purpose of their accession to the General Agreement on Tariffs and Trade.

There is annexed hereto a list of articles imported into the United States to be considered for possible modification of duties and other import restrictions, imposition of additional import restrictions, or specific continuance of existing customs or excise treatment in proposed trade agreement negotiations with the above countries.

In the case of each article in the list with respect to which the corresponding product of Cuba is subject to preferential treatment, the negotiations referred to will involve the elimination, reduction, or continuation of the preference, perhaps with an adjustment or specification of the rate applicable to the product of Cuba.

No article will be considered in the negotiations for possible modification of duties or other import restrictions, imposition of additional import restrictions, or specific continuance of existing customs or excise treatment unless it is included, specifically or by reference, in the annexed list or unless it is subsequently included in a supplementary public list. No duty or import tax imposed under a paragraph or section of the Tariff Act or Internal Revenue Code other than the paragraph or section listed with respect to such article will be considered for a possible decrease, although an additional or separate duty on an article included in the annexed list which is imposed under a paragraph or section other than that listed may be bound against increase as an assurance that the concession under the listed paragraph or section will not be nullified.

The negotiations will also include consideration of proposals to change the date in Article XXVIII of the General Agreement on Tariffs and Trade from January 1, 1951 to a later date. Article XXVIII now provides that the concessions negotiated at Geneva in 1947 and at Annecy in 1949 on individual products may be modified or withdrawn on or after January 1, 1951 after negotiation and consultation with other contracting parties without

the necessity of terminating the entire agreement. If the date in Article XXVIII is changed to a later date it would mean that the contracting parties would be precluded from the effective date of the amendment until such later date from invoking Article XXVIII to modify or withdraw concessions. The proposed change would affect all products on which the United States might make concessions at the forthcoming tariff negotiations as well as those in Schedule XX made at Geneva, Switzerland, and Annecy, France.

In addition to the governments listed above which are seeking accession to the General Agreement on Tariffs and Trade, the Government of the Philippines has also indicated its acceptance of the invitation of the contracting parties to undertake tariff negotiations for the purpose of accession. However, the United States will not undertake tariff negotiations with the Philippines at the forthcoming tariff negotiations in view of Section 508 of the Philippine Trade Act of 1946 (60 Stat. 158) which provides, in effect, that during the effectiveness of the agreement on trade and related matters between the United States and the Philippines, concluded pursuant to that Act, (61 Stat. (3) 2611; Treaties and Other International Acts Series 1588) the President shall not enter into a trade agreement with the Philippines under the Trade Agreements Act. Moreover, if the Philippines should accede to the General Agreement, which has been entered into by the United States pursuant to the Trade Agreements Act, it is intended that the United States would invoke Article XXXV of the General Agreement, by virtue of which the General Agreement would not apply as between the United States and the Philippines.

Persons interested in export items may present their views regarding any tariff (including preferential tariff) or other concessions that might be requested of the foreign governments with which negotiations are to be conducted.

Views concerning general provisions of a nature customarily included in trade agreements may also be presented.

Pursuant to Section 4 of the Trade Agreements Act, as amended, and paragraph 5 of Executive Order 10082 of October 5, 1949, information and views as to any aspect of the proposals announced in this notice may be submitted to the Committee for Reciprocity Information in accordance with the announcement of this date issued by that Committee.

The United States Tariff Commission has this date issued a notice stating the location and availability of tariff and commodity information pertinent to the pending negotiations announced herein.

By direction of the Interdepartmental Committee on Trade Agreements this 11th day of April, 1950.

_____,

Chairman
Interdepartmental Committee
on Trade Agreements

UNITED STATES INTENTION TO UNDERTAKE TRADE-AGREEMENT NEGOTIATIONS

The Interdepartmental Committee on Trade Agreements yesterday issued formal notice of the intention of the United States to undertake negotiations with 17 other countries for reciprocal tariff and other trade-barrier concessions and also looking toward accession of some of these countries to the General Agreement on Tariffs and Trade concluded at Geneva, Switzerland, in 1947. The negotiations are scheduled to begin at Torquay, England, on September 28, 1950. United States participation in the tariff negotiations will be under the provisions of the Trade Agreements Act of 1934 as amended and extended. The fact that the United States expected to take part in these negotiations was announced on November 10, 1949, in State Department Press Release No. 880.

The countries with which the United States expects to negotiate for mutually advantageous tariff and other concessions are: Australia, Austria, Belgium, Brazil, Canada, France, the Federal Republic of Germany, Guatemala, Korea, Luxemburg, New Zealand, the Netherlands, Norway, Peru, Turkey, the Union of South Africa, and the United Kingdom. Negotiations will be carried on with respect to all areas for which these countries are authorized to conduct trade-agreement negotiations.

Of the above countries, the following are "new" countries which desire to accede to the General Agreement: Austria, the Federal Republic of Germany, Guatemala, Korea, Peru, and Turkey.

The Torquay conference will constitute the third "round" of tariff negotiations carried on within the framework of the General Agreement. The first was held at Geneva in 1947 when 23 countries successfully concluded negotiations and became the original contracting parties

to the agreement. The second round was held at Annecy, France, in 1949, when 10 additional countries were accepted for accession to the agreement.

The Republic of the Philippines has also accepted an invitation to participate in the Torquay negotiations with a view to its accession to the General Agreement, but so long as the trade agreement between the United States and the Philippines, entered into pursuant to the Philippine Trade Act of 1946, is in effect the President is not authorized to enter into a trade agreement with the Philippines under the Trade Agreements Act of 1934, and the United States will not, therefore, be negotiating with the Philippines at Torquay. Moreover, if the Torquay negotiations should result in accession of the Philippines to the General Agreement, the terms of the General Agreement will not apply as between the United States and the Philippines. Provision for withholding such application is made in Article XXXV of the General Agreement.

The Geneva, Annecy, and "new" countries which are expected to take part in the Torquay conference carried on, among them, in 1948, some four-fifths of the world's international commerce. The accession of new countries to the General Agreement in the forthcoming negotiations will result in a wider acceptance, by additional trading nations, of the commercial principles upon which the United States economic foreign policy is based. These principles include reduction of unnecessary governmental interference with foreign trade, progressive abolition of discriminatory trade practices, and opportunity for multilateral expansion of foreign trade as a means of raising living standards throughout the world.

It is the belief of the United States that general acceptance of these principles will help solve the problems involved in United States foreign-assistance programs and the "dollar gap" by helping foreign countries to im-

prove their economies, increase their production, and to pay with their own goods and services for United States products which they would like to buy and which United States producers would like to sell abroad. The Torquay conference will thus represent another step in the advancement of the entire economic foreign program of the United States.

The Trade Agreement Committee's notice of intention to negotiate is accompanied by a list of products imported into the United States on which United States tariff concessions may be considered during the negotiations. Simultaneously, the Committee for Reciprocity Information announces that public hearings will be held, beginning May 24, 1950, on all phases of the forthcoming negotiations. The hearings will enable interested persons to present views and information regarding concessions on United States export products which might be requested from other countries, concessions on imports into this country which the United States might offer in return, and other matters customarily included in trade agreements. Applications to appear at these hearings will be received by the Committee for Reciprocity Information until May 10, 1950, and written briefs and statements will be received until May 17, 1950.

The Committee for Reciprocity Information was established by Executive Order of the President to receive such views and information and to digest and transmit them to the interdepartmental trade-agreements organization in conformity with Section 4 of the Trade Agreements Act of 1934. The members of the Committee for Reciprocity Information and the Committee on Trade Agreements are the same. They include a member of the United States Tariff Commission and representatives designated by the Secretaries of State, the Treasury, Defense, Agriculture, Commerce, and Labor, and the Administrator for Economic Cooperation. The member for

the Department of State is the chairman of the Committee on Trade Agreements and the member for the Tariff Commission is the chairman of the Committee for Reciprocity Information.

In the forthcoming negotiations the United States will not consider offering a concession on any article which does not appear on the list made public today, unless such article subsequently appears on a supplementary list and is made the subject of supplementary hearings by the Committee for Reciprocity Information.

No list of products on which the United States proposes to seek concessions from other countries is published. The Department of Commerce, however, furnishes the trade-agreements organization with studies of the trade in and other facts regarding articles exported from the United States on which the United States might consider seeking concessions from other countries in the negotiations.

Interested persons are invited to submit to the Committee for Reciprocity Information suggestions as to foreign concessions which might be sought for United States export products to aid the Trade Agreements Committee in making its recommendations to the President on export concessions to be requested.

The General Agreement on Tariffs and Trade has two major aspects. One consists of the specific tariff and other concessions made by each contracting party as set forth in the schedules annexed to the agreement. The other is the general provisions of the agreement relating to such matters as nondiscrimination in tariff and other trade regulations—quantitative import restrictions, customs formalities, and the like, which are necessary to safeguard the advantages gained through the specific concessions.

In the initial stage, the negotiations with regard to concessions on specified products are carried on bilaterally—that is, between pairs of countries. In the second stage the concessions bilaterally agreed upon are multilaterally considered and, if accepted, are integrated into the General Agreement. Thus each concession is granted to each contracting party to the agreement in its own right and each contracting party will be entitled, in its own right, to the benefits of all concessions granted by the other contracting parties.

The normal initial life of trade agreements negotiated by the United States under the Trade Agreements Act of 1934 has been three years, after which period they have been subject to termination on six months' notice. Article XXXI of the General Agreement, in providing for an initial 3-year term for the agreement with provision for subsequent withdrawal on six months' notice, is comparable to that provision of the earlier bilateral agreements. In order to introduce greater flexibility, Article XXVIII and the Annecy Protocol of Terms of Accession provide that after January 1, 1951 (the same date as that specified in Article XXXI) individual concessions made at Geneva or at Annecy shall be subject to modification or withdrawal by consultation and negotiation among the contracting parties, without withdrawal from the entire agreement.

The contracting parties, meeting at the Fourth Session in Geneva which began February 23, 1950, recommended that, during the Torquay conference, the participating countries consider extending the period ending January 1, 1951, as specified in Article XXVIII, to the period ending January 1, 1954, thus firming up the concessions granted at Geneva and at Annecy by putting them on the same basis as regards Article XXVIII, as the new concessions to be negotiated at Torquay. This contemplated action would not prevent participating countries at Torquay from negotiating there for limited adjustments in

their Geneva or Annecy schedules as well as new concessions. Nor will it prevent the use of the escape clause in Article XIX of the General Agreement at any time when circumstances necessitate its use.

The tariff concessions on specific products which may be negotiated under the General Agreement are of various types. They may be reductions in specified rates of customs duty, or "bindings" of such rates—a guarantee not to increase them during the life of the agreement. Likewise, a concession may consist of the binding of the duty-free status of an article—a guarantee not to impose a tariff on the article if it is being admitted duty free at the time the agreement is concluded. The contracting parties have adopted a rule to the effect that the binding of a low rate of duty may be accepted as a concession in compensation for a reduction in a high rate of duty. Under the Trade Agreements Act of 1934 as amended in 1945 the United States may not, in a trade agreement, increase or decrease a tariff rate by more than 50 percent of the rate existing on January 1, 1945.

COMMITTEE FOR RECIPROCITY INFORMATION

Trade-Agreement Negotiations With Each of the Following Countries:

I. Australia, Belgium, Brazil, Canada, France, Luxemburg, New Zealand, the Netherlands, Norway, the Union of South Africa, and the United Kingdom, which are contracting parties to the General Agreement on Tariffs and Trade; and

II. Austria, the Federal Republic of Germany, Guatemala, Korea, Peru, and Turkey, which are applicants for accession to the General Agreement on Tariffs and Trade; and

III. Possible Adjustment in Preferential Rates on Cuban Products.

Submission of Information to the Committee for Reciprocity Information

Closing date for application to be heard, May 10, 1950

Closing date for submission of briefs, May 17, 1950

Public hearings open, May 24, 1950

The Interdepartmental Committee on Trade Agreements has issued on this day a notice of intention to conduct trade-agreement negotiations with the following countries including in each case areas in respect of which the country has authority to conduct trade agreement negotiations: Australia, Austria, Belgium, Brazil, Canada, France, the Federal Republic of Germany, Guatemala, Korea, Luxemburg, New Zealand, the Netherlands, Norway, Peru, Turkey, the Union of South Africa, and the United Kingdom. Annexed to this public notice is a list of articles imported into the United States to be considered for possible concessions in the negotiations.

The notice of intention to negotiate states that it is proposed to enter into negotiations with these countries for the purpose of negotiating mutually advantageous tariff concessions. Negotiations with Austria, the Federal Republic of Germany, Guatemala, Korea, Peru, and Turkey will also be for the purpose of their accession to the General Agreement on Tariffs and Trade.

The Interdepartmental Committee on Trade Agreements as also announced in such notice that, in the case of each article in the list with respect to which the corresponding product of Cuba is subject to preferential treatment, the negotiations referred to will involve the elimination, reduction, or continuation of the preference, per-

haps with an adjustment or specification of the rate applicable to the product of Cuba. It has also been announced by the Interdepartmental Committee on Trade Agreements that consideration might be given proposals to change the date in Article XXVIII of the General Agreement on Tariffs and Trade.

The Committee for Reciprocity Information hereby gives notice that all applications for oral presentation of views in regard to the foregoing proposals, which must indicate the product or products on which the individuals or groups desire to be heard, shall be submitted to the Committee for Reciprocity Information not later than 12:00 noon, May 10, 1950, and all information and views in writing in regard to the foregoing proposals shall be submitted to the Committee for Reciprocity Information not later than 12:00 noon, May 17, 1950.

Such communications shall be addressed to "The Chairman, Committee for Reciprocity Information, Tariff Commission Building, Washington, 25, D. C.". Ten copies of written statements, either typed, printed, or duplicated shall be submitted, of which one copy shall be sworn to.

Public hearings will be held before the Committee for Reciprocity Information, at which oral statements will be heard. The first hearing will be at 10:00 a.m. on May 24, 1950, in the Hearing Room in the Tariff Commission Building, 7th and E Streets, N.W., Washington, 25, D. C. Witnesses who make application to be heard will be advised regarding the time and place of their individual appearances. Appearances at hearings before the Committee may be made only by or on behalf of those persons who have filed written statements and who have within the time prescribed made written application for oral presentation of views. Statements made at the public hearings shall be under oath.

Persons or groups interested in import products may present to the Committee their views concerning possible

tariff concessions by the United States on any product, whether or not included in the list annexed to the notice of intention to negotiate. However, as indicated in the notice of intention to negotiate, no tariff reduction will be considered on any product which is not included in the list annexed thereto or in a supplementary public list.

Persons interested in export items may present their views regarding any tariff (including preferential tariff) or other concessions that might be requested of the foreign governments with which negotiations are to be conducted.

Views concerning general provisions of a nature customarily included in trade agreements may also be presented.

Copies of the list attached to the notice of intention to negotiate may be obtained from the Committee for Reciprocity Information at the address designated above and may be inspected at the field offices of the Department of Commerce. The United States Tariff Commission has this date issued a notice stating the location and availability of tariff and commodity information pertinent to the pending negotiations announced herein.

By direction of the Committee for Reciprocity Information this 11th day of April, 1950.

Secretary,
Committee for Reciprocity Information

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 565

ARIS GLOVES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Customs Court (R. 16–38) [1] is reported at 188 F. Supp. 50. The opinion of the Court of Customs and Patent Appeals (Pet. App. 1–5) is reported at 96 Treasury Decisions No. 33, p. 22 (August 17, 1961).

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on July 7, 1961. On October 5, 1961, the Chief Justice extended the time for the filing of a petition for a writ of certiorari to and including

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[1] "R." refers to the printed record filed in the Court of Customs and Patent Appeals, which is on file in this Court.

December 4, 1961. The petition was filed on November 21, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTION PRESENTED

Whether the notice published by the Interdepartmental Committee on Trade Agreements in the Federal Register constituted, under Section 4 of the Trade Agreements Act of 1934, "reasonable public notice of the intention to negotiate an agreement * * *" involving a duty increase on gloves "in order that any interested person may have an opportunity to present his views to the President * * *."

STATUTE AND EXECUTIVE ORDER INVOLVED

The relevant portions of Section 4 of the Trade Agreements Act of 1934 (19 U.S.C. 1354), Executive Order No. 10082 (14 F.R. 6105), and the Notice of the Interdepartmental Committee on Trade Agreements are set forth in the Appendix, *infra*, pp. 11–14.

STATEMENT

Upon entry at the Port of New York on July 12, 1951, merchandise imported by petitioner was classified by the Collector of Customs as leather gloves under paragraph 1532(a) of the Tariff Act of 1930, 46 Stat. 667, as amended, 19 U.S.C. 1001. Customs duties were assessed against it at the rate of 35 per cent ad valorem under the paragraph. Thereafter petitioner filed this protest in the Customs Court based upon the asserted invalidity of the increase in duty from 25 per cent to 35 per cent ad valorem provided by Presidential Proclamation No. 2929, June 2, 1951, T.D. 52739, pursuant to the agreement reached

in the Torquay Protocol of 1951 (R. 7) to the General Agreement on Tariffs and Trade (GATT).[2] Petitioner's contention was that the notice of intention published on April 11, 1950, by the Interdepartmental Committee on Trade Agreements in the Federal Register (15 F.R. 2114) "to enter into negotiations [at Torquay] * * * for the purpose of negotiating mutually advantageous tariff concessions" (see *infra*, p. 12) must be interpreted to have given notice with respect to reductions, but not with respect to duty increases. Therefore, petitioner claimed, the notice was inadequate under Section 4 of the Trade Agreements Act of 1934, 48 Stat. 943, as amended, 19 U.S.C. 1354—which requires "reasonable public notice of the intention to negotiate an agreement"—to support the increase in duty on gloves which was negotiated at Torquay. The Customs Court, one judge dissenting, agreed with petitioner and held that the proper rate of duty was 25 per cent ad valorem (R. 30, 39).

The Court of Customs and Patent Appeals unanimously reversed. It held that the provision in the notice of intention relied upon by petitioner must be read in conjunction with the next paragraph of the notice:

> There is annexed hereto a list of articles imported into the United States to be considered for possible modification of duties and other

[2] The rate of duty on leather gloves prescribed by paragraph 1532 of the Tariff Act of 1930 was 50 per cent. The rate was decreased to 25 per cent by a provision in the General Agreement on Tariffs and Trade (T.D. 51802). In the Torquay Protocol, this provision was withdrawn and, in its place, a provision for a 35 per cent ad valorem rate was substituted.

> import restrictions, imposition of additional import restrictions, or specific continuance of existing customs or excise treatment in proposed trade agreement negotiation with the above countries.

Taken together, the court concluded, the two provisions constituted the reasonable public notice to interested parties of a possible increase in duties required by Section 4 of the Trade Agreements Act of 1934.

ARGUMENT

In this action, petitioner endeavors to invalidate a provision of the Torquay Protocol increasing the duty on leather gloves from 25 per cent ad valorem to 35 per cent ad valorem on the sole ground that the wording of the notice of intention to negotiate the Protocol did not give reasonable notice that the rate of duty on such merchandise might be increased. The Court of Customs and Patent Appeals held that the notice, when read as a whole, was sufficient to constitute reasonable public notice to interested persons of such a possible increase, as required by the Trade Agreements Act. We submit that that decision is clearly correct and does not conflict with the decisions of this Court or any other court. Accordingly, further review by this Court is not warranted.

1. Petitioner contends that the term "concessions" has the fixed and definite meaning of reductions in duty or "bindings" of present duty. Therefore, it claims, the use of that term in the notice did not apprise interested parties that an increase in duty might be negotiated at Torquay.

In rejecting this line of argument, the court below held that the term "concessions" was itself ambiguous and that, therefore, the import of the notice must be ascertained from an examination of it in its entirety. On the basis of that examination, it concluded that the notice gave sufficient indication of possible duty increases. If the court below erred in deeming "concessions" to be ambiguous, we submit that the error was in petitioner's favor. For to the extent that the term has a settled meaning in trade agreements, it is not limited to reduction or binding of duty as petitioner contends.

a. The phrase "mutually advantageous tariff concessions," which appears in the portion of the notice relied on by petitioner (see *infra*, p. 12), is used as a term of art in the General Agreement on Tariffs and Trade. As used in GATT, the word "concession" for all countries describes increases, bindings, and decreases of duty and other trade restrictions of all sorts. The term "mutually advantageous," moreover, is descriptive under GATT not of a particular negotiated adjustment respecting a single item, but of the total effect of the bargaining by any two or more countries. Thus, the GATT preamble speaks of "reciprocal and mutually advantageous arrangements" and Article XXVIII makes clear that "negotiations on a reciprocal and mutually advantageous basis * * * are of great importance to the expansion of international trade." Department of State Publication 6629, Commercial Policy Series 167, pp. 3, 55. While these negotiations are "directed to the substantial reduction of the general level of tariffs

and other charges on imports and exports * * *" (Article XXVIII, *id.* at p. 55), plainly this objective of reduction of the general level of tariffs may be attained by an agreement which lowers the rates on most items, but which may increase them moderately on a few. The schedules containing some such increases are still "Schedules of Concessions" (Article II, *id.* at p. 5), and the general agreement reached may still be "mutually advantageous" to the countries involved (Article II and XXVIII, *id.* at pp. 3, 55).[3]

b. From the very start of GATT the general reduction in tariff rates has been accompanied by increases in rates and restrictions on other items. Some increases were effected in the first negotiations under GATT at Geneva, Switzerland, in 1947, under a notice issued by the Interdepartmental Committee on Trade Agreements, which simply announced the intention to conduct "trade-agreement negotiations" (11 F.R. 13447).[4] In 1950, the Committee issued the notice referred to by petitioner—which stated that negotiations would be entered into "for the purpose of negotiating mutually advantageous tariff concessions" (see *infra*, p. 12). This resulted in the Torquay protocol, which reduced most tariff rates but raised some others, including that on leather gloves.

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[3] Petitioner notes (Pet. 7–15) that "concessions" is often used in trade agreements, statutes, and other official sources to mean, either in terms or in context, only reductions or bindings. But these instances do not show that when "concessions" is not so limited explicitly or implicitly, it nevertheless necessarily continues to have only this limited meaning.

[4] *Analysis of GATT* (Department of State Publication 2983, Commercial Policy Series 109), pp. 34, 104, 143.

In September 1955, the Trade Agreements Committee issued a notice announcing the intention to conduct trade agreement negotiations "for the purpose of negotiating mutually advantageous tariff concessions" (20 F.R. 7140), the precise language relied on by the petitioner as limiting the Torquay negotiations to decreases or bindings of duty only. It is significant that, while most of the arrangements negotiated at the major negotiating conference held pursuant to this notice in 1956 consisted of reductions in duties and in other trade restrictions, some increases were negotiated as well. Examples of such increases which were incorporated in the schedules of various countries include liquid sugar from Cuba and a variety of items in trade between the United States and the United Kingdom. See *Analysis of United States Negotiations, Sixth Protocol (Including Schedules) of Supplementary Concessions*, Department of State Publication 6348, Commercial Policy Series 158, pp. 48, 299–307.

Moreover, there are abundant examples, involving literally hundreds of commodities or items, of rate increases as a result of negotiations in the many GATT sessions held from time to time following standard notice provisions. These notices indicated that the purpose of the conferences was the renegotiating of concessions under Article XXVIII of GATT. The increases, with a full description of the countries involved in the negotiations and the commodities and rates subjected to negotiations, are found in the following Department of State Publi-

cations: 6001/152, 6201/154, 6291/156, 6324/157, 6667/169, and 6775/170. The last cited publication defines a "tariff concession" as (*id.* at p. 3):

> an agreement not to impose an import duty higher than that specified in the agreement, or not to impose any duty. ***The result of a concession may be a reduction in duty, a continuation of a duty, or an increase in duty.*** [Emphasis added.]

2. On the basis of the foregoing evidence, we think that the term "concession," standing alone, put interested parties on notice that there might be an increase in duty on one or more of the items (including gloves) that were listed as the subject of the Torquay negotiations. In any event, as the court below correctly held, the scope of the notice was not exclusively fixed by the expression "mutually advantageous tariff concessions," and the notice as a whole contained ample warning that increases in duty might be negotiated at Torquay.

The third paragraph of the notice reads in full:

> There is annexed hereto a list of articles imported into the United States to be considered for *possible modification of duties and other import restrictions, imposition of additional import restrictions,* or specific continuance of existing customs or excise treatment in proposed trade agreement negotiations with the above countries. [Emphasis added.]

This specific language was taken from Section 350 of the Tariff Act of 1930 as added by the Trade Agreements Act of 1934 (current Section 350(a)(1)(B), 19 U.S.C. 1351(a)(1)(B)), which, as petitioner itself

concedes (Pet. 16), authorizes the President to proclaim increases, decreases, or any change or binding of the full range of restrictions on trade.

Even if, however, the paragraph were read without reference to the statutory source of its language, it could not conceivably be taken as an assurance that no increase of duty would be considered for any article on the list. Rather, the use of the term "modification" rather than "reduction" and the statement that "additional import restrictions" might be imposed plainly showed the possibility that consideration would be given to according less favorable customs treatment to some articles—even though the overall result of the negotiations would be a lessening of trade restrictions.

Section 4 of the Trade Agreements Act does not require that the notice of intention to negotiate state expressly that, as to a particular article on the list, an increase in duty (or for that matter any other specific change in customs treatment) will be considered. All that the section requires is that "interested persons" be given "reasonable public notice of the intention to negotiate" so that they may have an opportunity to present their views to the officials concerned. In this case, petitioner and other importers of women's gloves were apprised by the notice that gloves were to be the subject of possible negotiation at Torquay and that the result might be a modification of the existing rate of duty or the imposition of additional import restrictions. If they were opposed to any change, they had ample opportunity to present their views.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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Assistant Attorney General.

ALAN S. ROSENTHAL,
TERENCE N. DOYLE,
Attorneys.

DECEMBER 1961.

APPENDIX

STATUTE AND EXECUTIVE ORDER INVOLVED

Section 4 of the Trade Agreements Act of 1934, 48 Stat. 943, as amended, 19 U.S.C. 1354, provides in part as follows:

> Before any foreign trade agreement is concluded with any foreign government or instrumentality thereof under the provisions of this Part, reasonable public notice of the intention to negotiate an agreement with such government or instrumentality shall be given in order that any interested person may have an opportunity to present his views to the President, or to such agency as the President may designate, under such rules and regulations as the President may prescribe * * *.

Paragraphs 4 and 5 of Executive Order No. 10082 (14 F.R. 6105), promulgated by the President under Section 4 of the Trade Agreements Act of 1934, as amended, provided in part as follows:

> 4. Before entering into the negotiation of a proposed trade agreement under the Trade Agreements Act, as amended, the Trade Agreements Committee shall submit to the President for his approval a list of all articles imported into the United States which it is proposed should be considered in such negotiations for possible modification of duties and other import restrictions, imposition of additional import restrictions, or specific continuance of existing customs or excise treatment. Upon approval by the President of any such list, as originally

submitted or in amended form, the Trade Agreements Committee shall cause notice of intention to negotiate such agreement, together with such list of articles, to be published in the FEDERAL REGISTER.

* * * * *

5. Any interested person desiring to present his views with respect to any article in any list referred to in paragraph 4 hereof, or with respect to any other aspect of a proposed trade agreement, may present such views to the Committee for Reciprocity Information, which shall accord reasonable opportunity for the presentation of such views.

The pertinent provisions of the notice of intention to negotiate (15 F.R. 2114, April 11, 1950) are:

INTERDEPARTMENTAL COMMITTEE ON TRADE AGREEMENTS

TRADE-AGREEMENT NEGOTIATIONS WITH CERTAIN COUNTRIES

* * * * *

Pursuant to section 4 of the Trade-Agreement Act, approved June 12, 1934, as amended (48 Stat. 945, ch. 474, Public Law 307, 81st Cong.) and to paragraph 4 of Executive Order 10082 of October 5, 1949 (14 F.R. 6105), notice is hereby given by the Interdepartmental Committee on Trade Agreements of intention to conduct trade-agreement negotiations with the following countries, * * *. It is proposed to enter into negotiations with these countries for the purpose of negotiating mutually advantageous tariff concessions. Negotiations with Austria, the Federal Republic of Germany, Guatemala, Korea, Peru, and Turkey will also be for the purpose of their accession to the General Agreement on Tariffs and Trade.

There is annexed hereto a list of articles imported into the United States to be considered for possible modification of duties and other import restrictions, imposition of additional import restrictions, or specific continuance of existing customs or excise treatment in proposed trade agreement negotiations with the above countries.

* * * * *

No article will be considered in the negotiations for possible modification of duties or other import restrictions, imposition of additional import restrictions, or specific continuance of existing customs or excise treatment unless it is included, specifically or by reference, in the annexed list or unless it is subsequently included in a supplementary public list. No duty or import tax imposed under a paragraph or section of the Tariff Act or Internal Revenue Code other than the paragraph or section listed with respect to such article will be considered for a possible decrease, although an additional or separate duty on an article included in the annexed list which is imposed under a paragraph or section other than that listed may be bound against increase as an assurance that the concession under the listed paragraph or section will not be nullified.

* * * * *

Pursuant to section 4 of the Trade Agreements Act, as amended, and paragraph 5 of Executive Order 10082 of October 5, 1949, information and views as to any aspect of the proposals announced in this notice may be submitted to the Committee for Reciprocity Information in accordance with the announcement of this date issued by this Committee.

The United States Tariff Commission has this date issued a notice stating the location and availability of tariff and commodity in-

formation pertinent to the pending negotiations announced herein.

By direction of the Interdepartmental Committee on Trade Agreements this 11th day of April 1950.

CARL D. CORSE,
Chairman, Interdepartmental Committee on Trade Agreements.

LIST OF ARTICLES IMPORTED INTO THE UNITED STATES WHICH IT IS PROPOSED SHOULD BE CONSIDERED IN TRADE AGREEMENT NEGOTIATIONS WITH THE COUNTRIES SPECIFIED IN FOREGOING PUBLIC NOTICE

The following list contains descriptions of articles imported into the United States which it is proposed should be considered for possible modification of duties and other import restrictions, imposition of additional import restrictions, or specific continuance of existing customs or excise treatment in the trade-agreement negotiations which are proposed with the countries specified in the foregoing public notice.

* * * * *

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No. 565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

ARIS GLOVES, INC.,

Petitioner

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

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PETITIONERS REPLY BRIEF

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In The

Supreme Court of the United States

October Term, 1961

No. 565

Aris Gloves, Inc.,

Petitioner

v.

The United States

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

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PETITIONERS REPLY BRIEF

I. "Concessions" Means Reductions of Duties, Not Increases

To our demonstration that "concessions" is used

> "in trade agreements, statutes and other official sources to mean, either in terms or in context, only reductions or bindings",

respondent replies that

> "these instances do not show that when 'concessions' is not so limited explicitly or implicitly, it nevertheless continues to have only this limited meaning." Respondent's brief, 6, fn. 3 (hereinafter Resp. Br.)

The "meaning" of a word is gathered from the meaning which is attached to it by invariable use. In the tariff-agreements area, "concessions" had never been used to "mean" duty increases; it was used only to mean duty reductions and bindings. By virtue of this meaning given to 'concessions' by GATT, the President, the Congress and the administrators themselves, it became what respondent labels a "term of art", Resp. Br. 5, a term of restricted meaning, *Suwannee Fruit & S.S. Co.* v. *Fleming*, 160 F.(2d) 897, 899 (Em. App.), a term with a built-in "limit".

Respondent asserts that "as used in GATT "concessions" "describes increases, bindings and reductions of duty", Resp. Br. 5. This is a bald assertion which flies in the face of a mass of proof to the contrary. Petition for Certiorari, 7-9 (hereinafter Pet. Br.). True, the

> "*objective* of reduction of the general level of tariffs may be attained by an agreement which lowers the rates on most items, but which may increase them moderately on a few." (Resp. Br. 6) (emphasis supplied throughout)

The issue, however, is not how to obtain this "objective", but whether the use of the word "concessions", consistently identified with "reductions" by both public and administrators, gave "reasonable notice" of an intention to negotiate increases. The existence of statutory power to attain objectives does not without more give warning that it will be exercised to the full on a particular occasion. Such a warning was rendered indispensable by the fact that the overwhelming mass of negotiations had theretofore been concerned with reductions, only 1 or 2 increases having been negotiated prior to the Torquay Agreement in suit. Pet. Br. 5.[1]

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[1] Respondent does not dispute that only one or two genuine increases were effected prior to Torquay as against thousands of reductions. Pet. Br. 5. Nor does it dispute that only 3 increases as against thousands of reductions emerged from the Notice in suit. Id. at 14.

Respondent would assimilate the 1947 notice of intention to conduct "trade agreement *negotiations*" under which "some increases were effected" with the notice in suit of intention to negotiate "mutually advantageous tariff *concessions*." Resp. Br. 6. "Trade agreement negotiations" covers the entire spectrum, increases as well as reductions; any one who is notified of such "negotiations" is forewarned that increases may be negotiated. But "concessions" was virtually synonymous with "reductions", and notice of a "purpose" (Pet. Br. 3) to negotiate *concessions* gave notice of restricted, not unlimited, "negotiations".

As to respondent's claim that there were "hundreds" of increases, all of its citations date *after* the Notice in suit. Resp. Br. 7-8.[2] If they were no more adequately noticed than that Notice, they merely compound the illegality and show persistence in a course of misleading conduct. By 1955, the date of respondent's first citation, there was not alone the prior identification of "concessions" with reductions in GATT and in the Executive Order, Pet. Br. 7-11, but the unmistakeable identification in § 1363 of the Act, id. at 11-12, about which, parenthetically no comment is made by respondent. These three sources (putting the administrator's own similar interpretations aside) gave "concessions" a meaning which was binding upon respondent.

The *first* State Department *definition* to include an "increase of duty" within the definition of "concessions", Resp. Br. 8, was issued in 1958, 6 years after petitioner alleged that the Notice was illegal, R. 4. Not alone does it smack of a self-serving declaration,[3] but

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[2] The first cited State Dept. Publ., 6001/152, was published in 1955, the last, 6775/170, in 1958.

[3] Moreover it departs from an unvarying line of administrative statements which omitted or differentiated increases from "concessions"; Pet. Br. 12-15, cf. id. at 7-9:

"Against the Treasury's prior long standing and consistent

> "Where an act of an official plainly falls outside the scope of his authority, he does not make that act legal by doing it and then invoking the doctrine of administrative construction to cover it." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 136.

Consider too that the statute does not merely require "notice"; it demands "reasonable notice", i.e. notice "suitable to the case",[4] such

> "as may fairly and properly be expected or required in the particular circumstances."[5]

Among the "circumstances" is the undeviating identification prior to the Notice in suit of "concessions" with "reductions", in GATT, Executive Order, statute and administrative pronouncements. Pet. Br. 7-15. Even today that identification remains imprinted in the public mind.[6] Against this background plus the history of tens of thousands of reductions, could the public "fairly" draw from the Notice of a "purpose" to negotiate "mutually advantageous concessions" a warning that respondent intended to negotiate increases? The fact that a lynx-eyed lawyer for respondent—long after the event—could espy a few

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interpretation, its more recent ad hoc contention as to how the statute should be construed cannot stand." *United States* v. *Leslie*, 350 U.S. 383, 396.

[4] *Commonwealth* v. *Central District Tel. Co.*, 243 Pa. 586, 590 (1914).

[5] *Sterling Mfg. Co.* v. *Hough*, 49 Neb. 618, 621 (1896); *State* v. *Aronson*, 330 S.W. (2d) 140, 144 (Mo. App. 1959).

[6] Pet. Br. App. 7-8. The current discussion of a new trade-agreement is replete with references to substitution of presidential power to negotiate across-the-board reductions with the Common Market for the present power to negotiate piece-meal "reductions," *never* a reference to increases. There is no need to burden the Court with additional quotations for it reads the newspapers.

increases[7] buried among 55,000 reductions, Pet. Br. 5, shows at best that what respondent *did* was at war with what it repeatedly *stated* to and led the public to believe. Pet. Br. 7-9, 12-15, 18-20. It does not constitute a notice "suitable to the case", a notice that would warn, not entrap, those who looked to it for protection, a notice, simply put, of a purpose to negotiate "reductions, bindings, increases and all other tariff arrangements".

II. The General Reference to "Modifications of Duties" Did Not Enlarge the Stated "Purpose" to Negotiate "Concessions"

Respondent is significantly silent about the administrators' interpretations of the Notice published immediately after it issued. Pet. Br. 18-20. Those interpretations substitute "concessions" for the phrase "modifications of duties and . . . import restrictions" upon which the court

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[7] Not once were these few "increases" labeled as concessions; they were "upward adjustments"; reductions or "compensatory *concessions*" were made *for* "increases".
So in State Department Publ. 6001 / 152, p. 2 (1955):

> "As compensation to the United States for this upward adjustment, Italy has agreed to reduce the rates on two items."

Again,

> "As compensation to the United States for these increases, rates have been reduced . . . The United States also benefits indirectly from *compensatory concessions* received by other countries." Id. 6201/154, p. 5 (1955).

And Cuba and the Dominican Republic

> "Agreed that United States *concessions* in the new negotiations not only *balanced* the new *concessions* it was offering to the United States but also would *compensate* for the increases in the liquid sugar rates . . ."

Such statements reflect not only the awkwardness of fitting increases into the connotation of "concessions" but an administrative recognition that increases were something apart, something which was not "conceded" but "upward adjustments" which had to be "compensated" for.

below relied to illuminate the meaning of "concessions". Pet. Br. 3. This silence confesses that Respondent cannot explain away these substitutions, that it cannot justify a repudiation of the governments own prompt identification of "modifications" with "concessions, and that it cannot ask this Court to hold that a layman should have read the Notice in a quite different sense than the government itself promptly assigned to it. Pet. Br. 5, 18-20.

The argument that "modifications" echoed the statutory phrase, Resp. Br. 8, ignores the legislative history of the phrase and its marriage to 55,000 reductions as against a handful of surreptitious increases. Pet. Br. 15-17. Any doubt is dispelled by the administrators' own immediate identification of "modifications" with "concessions".

Nor is the presence of the words "additional import restrictions" helpful to respondent, Resp. Br. 9, because it too was caught up in the immediate administrative substitution of "concessions" for the entire phrase in the Notice: "possible modifications of duties and other import restrictions, imposition of additional import restrictions . . .", showing that "reductions" alone were in contemplation.

Respondent erroneously suggests that we demand that there be notice of an intention to negotiate

> "as to a particular article on the list, an increase in duty . ." Resp. Br. 9.

We simply urge that "reasonable notice" requires notice that *some increases* will be negotiated.

It is no answer that there was notice that "gloves were to be the subject of possible negotiation," Resp. Br. 9, when the Notice was for the stated

> "*purpose* of negotiating mutually advantageous *concessions*".

Conclusion

Respondent urges that the decision below "does not conflict with the decisions of this Court or any other court". Resp. Br. 4. But there are other "special and important reasons" for review in this Court. No case is more important than correction of governmental action which is *plainly unlawful* and injurious. We delegate vast powers on faith that they will not be abused. When clear abuses go unchecked arbitrariness is emboldened, confidence in the democratic process is shaken.

This Court has sheltered a single alien branded as an "unsavory character" by the Attorney General from *an unlawful* deportation, *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260; it has protected a solitary federal employee from unlawful discharge as a "security risk", for failure to comply with departmental regulations, though they were more rigorous than the statute required, *Service* v. *Dulles*, 354 U.S. 363; it has shielded a soldier from an *unlawful* discharge in a form that was otherwise than "honorable", though the government sought to insulate the illegality behind an alleged lack of jurisdiction to review. *Harmon* v. *Brucker*, 355 U.S. 579. Shall it be said that the patently unlawful impairment of an established livelihood is less important?

Respectfully Submitted,

Ruth Bader
Counsel for Petitioner

Mary Rehan
of Counsel

January, 1961